BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BALASSA I. ARRIAGA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,163
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the September 19, 2011 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller (ALJ).

ISSUES

The ALJ denied claimant's request for temporary total disability compensation and medical treatment having found claimant failed to prove that there was a causal connection between the labors of her employment and the diagnosed idiopathic pulmonary fibrosis.

The claimant requests review of whether the ALJ exceeded her jurisdiction in denying relief for medical treatment and temporary total disability. Claimant contends that her physical difficulties, including the pneumonia, bronchitis and pulmonary fibrosis are the result of her exposure to the cold in respondent's plant.

Respondent argues that the ALJ's Order should be affirmed as the only medical opinion in this record identifies claimant's pulmonary fibrosis as "idiopathic". Therefore, claimant has failed to prove that this alleged occupational disease had its origin in a special risk of claimant's employment with respondent.[1]

Claimant argues that the ALJ exceeded her jurisdiction in taking judicial notice of certain medical definitions obtained off the internet, dealing with idiopathic pulmonary

[1] L. 2011, Ch. 55, Sec. 25.

fibrosis. Claimant contends the medical definitions are hearsay and no proper foundation was provided. Respondent contends hearsay is admissible in workers compensation litigation. Additionally, any objection would go to the weight of the evidence and not the admissibility.

FINDINGS OF FACT

Claimant was a long-term employee of respondent, having been employed there for about 15 years. Claimant spent about nine years working in an area folding boxes. In 2007 or 2008, claimant was transferred to a refrigerated area. Since that time claimant has been hospitalized three times for pneumonia and either bronchitis or a cough. Claimant was first hospitalized in 2008 although claimant's memory appears somewhat suspect as to the exact dates of hospitalization. The last time claimant was hospitalized was in February 2011. Claimant did not return to work for respondent after the February 2011 hospital stay. The K-WC E1 Application for Hearing, filed by claimant on August 15, 2011, alleges a date of accident on June 10, 2011 and thereafter.

Claimant testified that the refrigerated area of the plant smelled like Clorox and at times like ammonia. She also testified that respondent would periodically use dry ice in the refrigerated area of the plant. This also produced an odor. These odors are not constant. The odors cause claimant difficulty breathing.

On March 7, 2011, claimant was examined by Frank W. Hansen, M.D., of the Siena Medical Clinic in Garden City, Kansas. Claimant was diagnosed with probable pulmonary fibrosis. Claimant's medical history was positive for previously noted esophagitis, pneumonia and a question of pulmonary fibrosis. Chest x-rays showed increased interstitial markings, decreased flow rates and decreased lung volumes consistent with restrictive lung disease. Claimant was again examined by Dr. Hansen on March 28, 2011, with the diagnosis being "probable idiopathic pulmonary fibrosis".[2] In a document containing a handwritten date of June 8, 2011, claimant was restricted from working in the cold, below 60 degrees, by Dr. William Valdez, of the Southwest Medical Center. None of the admitted medical reports in this record contain a causation opinion regarding claimant's pulmonary fibrosis.

At the preliminary hearing, respondent introduced several documents off the internet, including documents from the A.D.A.M. Medical Encyclopedia from the U.S. National Library of Medicine, the Mayo Clinic, and the free encyclopedia source, Wikipedia. Respondent asked that the ALJ take judicial notice of these documents which were purported to define pulmonary fibrosis and idiopathic pulmonary fibrosis. The ALJ allowed the documents into evidence over claimant's objection, finding that claimant's objection

[2] P.H. Trans, Cl. Ex. 2 at 3 (Dr. Hansen's Mar. 7, 2011 office note).

would go more to the weight allowed the offered material rather than to the admissibility.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[5]

K.S.A. 60-409 states:

> (a) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.
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> (b) Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (2) the laws of foreign countries and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.
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> (c) Judicial notice shall be taken of each matter specified in subsection (b) of this section if a party requests it and (1) furnishes the judge sufficient information to enable him or her properly to comply with the request and (2) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

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[3] L. 2011, Ch. 55, sec. 1, 5.

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] L. 2011, Ch. 55, sec. 1.

K.S.A. 60-410 states:

> (a) The judge shall afford each party reasonable opportunity to present to him or her information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.
>
> (b) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (1) the judge may consult and use any source of pertinent information, whether or not furnished by a party; and (2) no exclusionary rule except a valid claim of privilege shall apply.
>
> (c) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince the judge that a matter falls clearly within K.S.A. 60-409, or if it is insufficient to enable him or her to notice the matter judicially, he or she shall decline to take judicial notice thereof.
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> (d) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within K.S.A. 60-409, shall be a matter for the judge and not for the jury.(a) The judge shall afford each party reasonable opportunity to present to him or her information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

The ALJ allowed judicial notice of respondent's offered medical documents, ruling that any objection would go to the weight given the material rather than the admissibility.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[6]

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[6] K.S.A. 44-534a(a)(2).

The ruling by the ALJ was an evidentiary ruling on a preliminary matter. This action is well within the jurisdictional power of an ALJ at a preliminary hearing. The Board normally does not take jurisdiction over evidentiary rulings on appeal from a preliminary decision. Claimant's appeal of this issue is dismissed.

Claimant contends that she suffered an accidental injury through a series of traumas from June 10, 2011 and thereafter. Respondent contends that this is an occupational disease. However, in order to prove a series of traumas or an occupational disease, claimant must prove that her condition arose out of and in the course of her employment with respondent.

Claimant contends that since she was working in a cold environment, the development of pulmonary fibrosis must have been caused by that exposure. Here, the medical evidence identifies the pulmonary fibrosis as "probable idiopathic".[7] No medical opinion identifies claimant's employment with respondent as being a causal or contributing factor in the injury or disease development. The ALJ found, and this Board Member agrees, that claimant failed to prove that the idiopathic pulmonary fibrosis has any causal connection to the labors of her employment. The denial of benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered an accidental injury or occupational disease as the result of her employment with respondent. The denial of benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated September 19, 2011, affirmed.

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[7] P.H. Trans., Cl. Ex. 2.

[8] L. 2011, Ch. 55, Sec. 22.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Kerry McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge